U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

NOTICE: This is an electronic bench opinion which has not been verified as official.

Date: 10/29/99
Case No.: **1999 INA 208**

In the Matter of:

GERALD AND LOUISE PUSCHEL, Employer,

on behalf of

DANUTA SROKOWSKA, Alien.

Appearance: J. A. Avirom, Esq., of New York, New York, for the Employer and Alien
Certifying Officer: R. A. Lopez, Region I.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of DANUTA SROKOWSKA ("Alien") by GERALD AND LOUISE PUSCHEL(the "Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at Boston, Massachusetts, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On October 25, 1996, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Live-In Cook" in their Private Home. AF 129-130. The duties of the Job to be Performed were the following:

> Cooks meals, in private home, according to recipes and tastes of employer. Cooks meats, fish, vegetables. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals.

AF 129, box 13. (Copied verbatim without change or correction.) The position was classified as a "Cook" under Occupational Code No. 305.281-010 of the DOT.[3] No minimum education or training was specified, but the experience requirement was two years in the Job Offered or in the Related Occupation of "Chef, any environment requiring cooking for groups between 3 & 20 people."[4] The "Other Special Requirement" was "May not smoke on job-site. Must be willing to wok the following schedule: 6:30 a.m. to 8:45 a.m., 12:00 noon to 2:30 p.m., 4:00 to 7:30 p.m., all Monday through Friday, and 8:45 a.m. to 11:30 a.m. on Saturday." (Copied verbatim without change or correction.). AF 129, boxes 14-15.[5] The hourly rate was $13.26, and the overtime rate

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]305.281-010 **COOK** (domestic ser.) Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

[4] The Alien was born 1956 and was a national of the Poland, who was living and working in the Job Offered at the time of application under a B-2 visa. AF 131, boxes 01-08. She did not indicate that she had any education or training whatsoever. From May 1989 to August 1992 she worked as a cook in restaurants in Poland. From September 1994 to the date of application she lived and worked as live-in cook at the Employer's home. AF 131-132, boxes 15 a-c.

[5]The household consisted of two adults and two children, ages 13 and 14. AF 130, box b.

was $19.89 per hour.[6]

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated September 15, 1998. AF 32-33. The CO considered the evidence regarding business necessity that the Employer filed on April 29, 1998, and May 26, 1998, and found it insufficient, as the Employer's proof was that it needed a cook who would work an aggregate of eight hours in three segments of a split shift extending over a thirteen hour period each day. This, said the NOF, did not appear to establish the business necessity for a live-in requirement. Addressing the evidence, itself, however, the NOF observed that the diary pages did not clearly describe the events which the Employer said absorbed the time of both the husband and the wife. The NOF required the Employer to submit a specific entertainment and/or volunteer work schedule for the preceding twelve month period, which would supply such details and names, dates, and places relevant to the Employer's proof. In the alternative, the Employer was told to delete the live-in requirement. AF 33.

Rebuttal. Transmitted by counsel's cover letter of November 18, 1998, Employer's rebuttal consisted of a letter by Mrs. Puschel and a selection of several recipes for desserts and other foods that the cook apparently was required to prepare as part of the job duties. AF 08-29. Mrs. Puschel explained that she was deeply and extensively involved in organization and community activities of the Junior League of Greenwich, Connecticut, in her own social life, and in her support of her husband's business career. Because of her unavailability, she needed a cook to prepare the regular meals and the other food required for her family, which included medically required low cholesterol diets for her husband and son. She concluded, "Lastly, the hours of the job itself are conducive to a live-in requirement since [the cook] works from 6:30 a.m. to 7:30 p.m. with the specified breaks between meal times. With these long hours and the long breaks in between it would not make sense to ask [the cook] to travel to her home during her breaks and return for the next meal service. ... Thus, because of the 12 hour span of her day with the extended breaks during her shifts, it is a requirement of the job that [the cook] live with us." AF 09.

Final Determination. Certification was denied in the Final Determination on January 29, 1999. AF 05-06. After reviewing the Application, he NOF and the rebuttal, the CO concluded that the requirement that the worker live on the Employer's premises was unduly restrictive within the meaning of 20 CFR § 656.21(b)(2)(i), explaining, "Household cooks are not normally required to live at the worksite. The circumstances described in your application do not establish that your live-in requirement arises from a business necessity." The CO then noted Employer's statement that, "[A]lthough we have identified three general times for meal preparation and service, because of our complex and often fluctuating schedules, the hours [f]requently vary and having someone reside with us allows that person to adapt and accommodate [to] our changing schedules." After discussing the length of the split shift workday and the practical limitations on

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[6]There is no evidence in the file referred to BALCA that this position was advertised before the state employment security agency ("state agency") transmitted the application it to the Department of Labor ("DOL") for disposition.

the worker's use of break time during the day, the CO said, "To require a U. S. worker to live on the premises appears to be unduly restrictive and not normal to the position. There appears to be no compelling need for a U. S. worker to be required to live on the employer's premises, given the job duties and hourly work schedule as identified on the application." The CO then concluded,

> The employer's business necessity regarding the live-in requirement does not demonstrate that the job requirement to live on the premises bears a reasonable relationship to the occupation in the context of the employer's business and is essential to perform, in a reasonable manner, the job duties as described by the employer on the application., *i.e.* 'Cooks meals, in private home, according to recipes and tastes of employer. Cooks meats, fish, vegetables. Plans menus and orders foodstuff. Cleans kitchen and cooking utensils. Serves meals.' The evidence you submitted regarding the business necessity for the live-in requirement was not sufficient."

AF 06.

Appeal. On February 18, 1999, the Employer filed a request for review by BALCA. to which was attached a statement of the grounds for review. AF 02-04. Quoting the CO's explanation for the denial of certification, Employer argued, "The Certifying Officer seems to be suggesting that it would be acceptable for the alien worker to work a thirteen hour day, taking two breaks in excess of two hours in an area 'nearby' her place of employment. We believe this is not logical and that such harsh terms of employment would not be accepted by anyone, including a U. S. worker."

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Discussion

The Employer has appealed the CO's finding that a condition of being hired for this job was that the worker agree to live at the worksite was an unduly restrictive requirement. While an employer may adopt any qualifications it may fancy for hiring a worker to cook and otherwise perform the work of a business or household, when the employer seeks to apply such hiring criteria to U.S. job seekers in the process of testing the labor market as part of his application for alien labor certification he must comply with the Act and regulations.

Burden of proof. For the reasons that follow, the Employer must carry the burden of proof as to all of the issues arising under its application pursuant to the Act and regulations. The imposition of the burden of proof is based on the fact that labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification:

> "Whenever any person makes application for a visa or any other documentation required

> for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

Consequently, the Panel must strictly construe this exception, and must resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

Unduly restrictive job requirements. An employer cannot use requirements that are not normal for the occupation or not included in the Dictionary of Occupational Titles unless the employer establishes a business necessity for the requirement. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U. S. workers who may apply for or qualify for the job opportunity. **Venture International Associates**, 87 INA 569 (Jan. 13, 1989)(*en banc*). The Employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), which was adopted to implement the relief granted by the Act, and which disallows the use of unduly restrictive job requirements in the recruitment process unless the employer can prove business necessity. **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), described the criteria for proof of business necessity. Employer must show: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the restrictive requirement is essential to performing in a reasonable manner the job duties described by the employer. The business necessity for a restrictive requirement is not established where the employer fails to provide supporting documentation. **Coker's Pedigreed Seed Co.**, 88 INA 048(*en banc*); also see **Valley Rest Nursing Homes**, 96 INA 029 (Jun. 5, 1997); **John Hancock Financial Services**, 91 INA 131 (Jun. 14, 1992).

Employer's proof. In this case, the Employer's reasons for requiring the worker to live-in was based on a split shift extending over a day that Employer admitted would last a total of thirteen hours. The worker must begin work at 6:30 a.m. and remain available until 7:30 p.m., subject only to the breaks specified between meal times. While a split shift is not barred *per se*, the Employer's proof of business necessity required it to show that the split shift was necessary in order for the worker to perform in a reasonable manner the job duties described at the times designated in the Application. **Marion Graham**, 88 INA 102 (Mar. 14, 1990)(*en banc*). The Employer did not argue that the low cholesterol food for Mr. Puschel and his son and the other meals could not be cooked at regular hours. Thus, the residual problem was the service of the meals the cook had prepared at times that would accommodate their "complex and often fluctuating schedules." Although Mrs. Puschel pointed out that, "The hours frequently vary and having someone reside with us allows that person to adapt and accommodate [to] our changing schedules," the rebuttal did not question that the cooking, itself, could be performed during a

normal eight hour workday. Consequently, the Employer's burden of proof required it to explain why the meals could not be prepared during a normal workday, and be put left for the Employer to consume whenever the respective schedules of the husband's work and the wife's community services allowed each of them to return home.

Summary. Even though the job duties in the Application did include "Serves meals" and even though the DOT noted that the domestic cook "May serve meals" in the occupation description at footnote #3, there is no suggestion that serving the meals to the Employer was the primary duty of the cook or was a business necessity. It is significant that the rebuttal argument on business necessity clearly relied on Employer's claim that the household needed to have a cook prepare meals that would include foods cooked according to low cholesterol recipes. The rebuttal never suggested that the Employer's business necessity encompassed the need that the worker serve the household such prepared foods at the eccentric times Mrs. Puschel asserted that she and her husband would return home for the dinner meal.

Based on the foregoing analysis the Panel finds that the Employer's claim of the business necessity of a split shift extending over a thirteen hour duty period was addressed to the work of serving food that is usually performed by a household domestic service worker and not to duties requiring the skills of a domestic cook. As the work of serving out prepared food does not need the training and experience Employer required of a domestic cook and such work is a normal duty of a Schedule B worker under 20 CFR §.656.11(a)(26), the need for a worker to serve food to the Employer at regular or eccentric hours is not sufficient to sustain the burden of proving the business necessity of this position under all of the circumstances of this case.

Consequently, the Panel finds that Certifying Officer correctly concluded that the Employer did not sustain its burden of proof. Accordingly, the following order will enter.

ORDER

The Certifying Officer's Final Determination denying labor certification is hereby affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: **99 INA 208**
GERALD AND LOUISE PUSCHEL, Employer,
DANUTA SROKOWSKA, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis	10/5/99		
Huddleston	8/3/99		

Thank you,

Judge Neusner

Date: June 23, 1999